FILED
AUG 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 06-39

IN THE

Supreme Court of the United States

IN THE MATTER OF THE ESTATE OF SAMUEL M. DAMON,
TRUST CREATED UNDER THE WILL OF SAMUEL DAMON,

CHRISTOPHER JAMES DAMON HAIG,
Petitioner,

v.

SHARON DAMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Hawaii

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONER

Paul J. Orfanedes
Counsel of Record
Meredith L. Di Liberto
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, D.C. 20024
(202) 646-5172

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

A. THE FEDERAL APPROACH TO RETROACTIVITY 2

B. HAWAII'S APPROACH TO RETROACTIVITY 7

C. HAWAII VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY FAILING TO CONSIDER THE ISSUE OF RETROACTIVITY 8

CONCLUSION 10

TABLE OF CITATIONS

Cases **Page**

American Trucking Ass'n v. Smith,
496 U.S. 167 (1990) 4, 5

Bouie v. City of Columbia, 378 U.S. 347 (1964) ... *passim*

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 5, 6

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 4

Gap v. Puna Geothermal Venture,
106 Haw. 325 (2004) 7

Great Northern Railway v. Sunburst Oil,
287 U.S. 358 (1932) 4

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 4

In re Trust Estate of Dwight,
80 Haw. 233 (1995) 8

Intel Containers Int'l Corp. v. Huddleston,
507 U.S. 60 (1993) 2, 3

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 5

Kramer v. Ellett, 108 Haw. 426 (2005) 7

Page

Landgraf v. USI Film Products,
511 U.S. 244 (1994) ..... *passim*

State v. Garcia, 96 Haw. 200 (2001) 7

State v. Ikezawa, 75 Haw. 210 (1993) 7

United States v. Security Indus. Bank,
459 U.S. 70 (1982) 4

Statutes and Rules

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

Miscellaneous

"U.S. Supreme Court justice expressed concern
for Hawaii court," *Associated Press*,
February 9, 2006 8

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Judicial Watch, Inc. ("Judicial Watch") respectfully submits this *amicus curiae* brief in support of Petitioner Christopher James Damon Haig. Pursuant to Supreme Court Rule 37.2(a), counsel for all parties have consented to the filing of this *amicus curiae* brief. Written consent to the filing of this brief is being filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

Judicial Watch is a not-for-profit organization that seeks to promote integrity, transparency, and accountability in government, politics, and public life. In furtherance of these goals, Judicial Watch regularly monitors significant developments in the court system and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern, among other activities. Judicial Watch is participating as *amicus curiae* in this matter because it is particularly concerned about the legal protections afforded to property rights, the fair and consistent application of precedent, and the regularity of court process. Judicial Watch believes this matter implicates all three of these important concerns.

---

[1] Pursuant to Supreme Court Rule 37.6, Judicial Watch states that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be granted to address an important federal question raised by the Supreme Court of Hawaii's ruling in this matter, namely, whether a state can violate the Due Process Clause of the Fourteenth Amendment by giving retroactive application to the rulings of its courts. The Supreme Court of Hawaii appears to have disregarded this Court's decisions and violated Petitioner's Fourteenth Amendment rights by applying a 1995 decision to the estate of a testator who passed away in 1924. In so ruling, the Supreme Court of Hawaii failed to even consider whether the 1995 ruling should be given retroactive effect, thereby substantially diminishing the portion of the estate to which Petitioner otherwise would have been entitled.

ARGUMENT

A. THE FEDERAL APPROACH TO RETROACTIVITY

Of primary importance in any fair and just and legal system is predictability in the application of the law and the protection of settled expectations and vested rights. These concerns provide the basis, at least in part, for several provisions of the U.S. Constitution, including the *Ex Post Facto* Clauses, the prohibition on impairment of contractual obligations, the prohibition on bills of attainder, the Takings Clause, and the Due Process Clause. *Landgraf v. USI Film Products*, 511 U.S. 244, 266-68 (1994). These same concerns also provide the basis for the principle of *stare decisis*. *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79 (1993) (Scalia, J., concurring) (noting that the principal purposes of

stare decisis are "to protect reliance interests and to foster stability in the law."). As this Court has declared:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Landgraf, 511 U.S. at 265 (citation omitted).

Perhaps nowhere do these concerns have greater significance than in the context of retroactivity. This Court's "retroactivity" jurisprudence is substantial.

The Court has declared repeatedly that there is a presumption against the retroactivity of federal statutes. *Landgraf*, 511 U.S. at 265-66. "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. The Court has described this presumption as being "deeply rooted in our jurisprudence" and "embod[ying] a legal doctrine centuries older than our Republic." *Id.* at 265. The possibility that the "Legislature's unmatched powers [could] allow it to sweep away settled expectations suddenly and without individualized consideration" prompted the Court to require a clear expression of congressional intent to defeat this clear

presumption against retroactivity. *Id.* at 266; *see also United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982).

The Court has adopted a separate set of rules to govern the retroactivity of federal judicial decisionmaking. Rather than applying a presumption for or against retroactivity, the Court has held that the following three factors should be analyzed: (1) whether the decision establishes a new principle of law by either overruling a relied-upon precedent or deciding an issue of first impression not clearly foreshadowed; (2) whether the purpose and effect of the decision would be furthered or restricted by retroactive application; and (3) whether the inequity imposed in the retroactive application is substantial or works an injustice or hardship. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971).

"When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Ass'n v. Smith*, 496 U.S. 167, 177 (1990); *see also Great Northern Railway v. Sunburst Oil*, 287 U.S. 358, 364-65 (1932).

This authority is not without limitations, however. In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 99 (1993), the Court held that "[t]he Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law." *Id.* (internal citation omitted). Similarly, in *American Trucking Ass'n*, the Court declared that it has consistently required state courts to "adhere to our retroactivity decisions" in order

to "ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights." 496 U.S. at 178.

The Court addressed this issue more directly in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991):

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. . . . Once a rule is found to apply "backward," there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.

Id. at 534-35. While the Court noted that this inquiry is governed by state law, at least where the case originates in state court, it nonetheless is "[s]ubject to possible constitution thresholds." *Id.* at 535.

The Court expressly applied this constitutional limitation on the retroactivity of state judicial decisions in both *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) and again in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Brinkerhoff-Faris Trust & Sav. Co.*, the Supreme Court of Missouri overruled a prior decision finding that a state statute did not create an administrative remedy, then found against the plaintiff for failing to pursue the previously

unavailable remedy. This Court found that the Supreme Court of Missouri's ruling violated the plaintiff's Fourteenth Amendment rights:

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.
>
> But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, -- whether it has had an opportunity to present its case and be heard in its support.

281 U.S. at 680-81.

In *Bouie*, this Court found that the Fourteenth Amendment's Due Process Clause prohibited the State of South Carolina from convicting the defendants of violating its criminal trespass statute based upon an interpretation of the statute by the South Carolina Supreme Court that was "clearly

at variance with the statutory language" and did not have "the slightest support in prior South Carolina decisions." 378 U.S. at 356.

B. HAWAII'S APPROACH TO RETROACTIVITY

Importantly, Hawaii has its own precedent governing the retroactivity of its state law decisions. In *Gap v. Puna Geothermal Venture*, 106 Haw. 325, 333 (2004), the Supreme Court of Hawaii declared that "Hawai'i statutory and case law discourage retroactive application of laws and rules in the absence of language showing that such operation was intended." *See also Kramer v. Ellett*, 108 Haw. 426, 432 (2005) (noting general disfavor of retroactivity in law and specific disfavor in Hawaii); *State v. Garcia*, 96 Haw. 200, 211 (2001).

In *State v. Ikezawa*, 75 Haw. 210 (1993), the Supreme Court of Hawaii considered whether a decision overturning a prior ruling should be applied retroactively. Citing the "administration of justice and the integrity of the judicial process," the Supreme Court of Hawaii applied this Court's three-part *Chevron Oil* test and declined to apply its new ruling to the defendant retroactively even though a retroactive application of the new ruling would further the purpose of correcting the erroneous prior ruling. *Id.* at 220-23. The Court found that the defendant's reliance on the erroneous prior ruling was substantial and that applying the new ruling to the defendant retroactively would prejudice the defendant and "produce a substantially inequitable result." *Id.*

C. HAWAII VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY FAILING TO CONSIDER THE ISSUE OF RETROACTIVITY

In this case, Petitioner expressly objected to *In re Trust Estate of Dwight*, 80 Haw. 233 (1995) being applied retroactively (Appendix D at 63a-67a) and argued on rehearing that doing so violated his Fourteenth Amendment rights. Appendix E at 69a-73a. Not only does it appear that the Supreme Court of Hawaii failed to consider Petitioner's arguments and objections, but it apparently denied Petitioner oral argument as well.[2] Its ruling also appears to be in direct conflict with Hawaii's own precedent disfavoring retroactivity.

In this regard, this case is not unlike both *Brinkerhoff-Farris Trust & Savings Co.* and *Bouie*, as the Supreme Court of Hawaii effectively deprived Petitioner of due process in "the primary sense" by failing to consider his arguments and objections with respect to retroactivity. Also as in *Bouie*, the Supreme Court of Hawaii's decision does not appear to have any support in Hawaii's prior decisions. *Bouie*, 378 U.S. at 356. In this regard, this case calls to mind this Court's

---

[2] The Supreme Court of Hawaii apparently holds oral arguments only rarely. At a meeting of local attorneys and judges in Honolulu in February 2006, the same month the decision was issued in this case, U.S. Supreme Court Justice Anthony Kennedy expressed concern to Hawaii Supreme Court Chief Justice Ronald T. Y. Moon, the author of the underlying decision, about the paucity of oral arguments held by the Court. "Justice Moon, I'm concerned about your court," Justice Kennedy reportedly stated. "U.S. Supreme Court justice expressed concern for Hawaii court," *Associated Press*, February 9, 2006.

statement in *Landgraf* regarding the process by which retroactivity decisions are reached:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s] , . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 511 U.S. at 270 (internal citation omitted). Of course, judges' instincts can only be sound to the extent that they are utilized, and it does not appear that there was any "process of judgment" with respect to the retroactive application of *In re Trust Estate of Dwight* to the facts of this case. The Supreme Court of Hawaii's failure to consider the issue of retroactivity, much less apply its own retroactivity precedent to the case at hand, despite Petitioner's express objection and argument that doing so would violate his Fourteenth Amendment rights, warrants review by this Court.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

Paul J. Orfanedes
Counsel of Record
Meredith L. Di Liberto
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, D.C. 20024
(202) 646-5172

Counsel for Amicus Curiae

August 14, 2006